4-0900-6322-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Revocation, Suspension, or Nonrenewal of the Basic Life Support Ambulance License of the City of West St. Paul.

RECOMMENDATION FOR SUMMARY DISPOSITION

The above-entitled matter is before the undersigned Administrative Law Judge on the parties' cross-motions for summary disposition. Both the Department and the Licensee filed their initial motions on May 18, 1992. The Licensee filed its reply brief on June 1, 1992. The record on this motion clo5ed on June 18, 1992, with the filing of the Department's final submission.

Arnold E. Kempe, City Attorney, 16l6 Humboldt Avenue, West St. Paul, Minnesota 55118-3972 submitted the motion on behalf of the Licensee, the City of West St. Paul. Richard A. Wexler, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103 submitted the motion on behalf of the Minnesota Department of Health (hereinafter "the Department" or MDOH).

Based on the record herein, and for the reasons set out in the attached Memorandum,

IT I$ HEREBY RECOMMENDED THAT:

1. The Licensee's Motion for Summary Disposition be DENIED.

2. The Department's Motion for Summary Disposition be GRANTED.

3. The Commissioner not renew the basic life support ambulance license of the City of West St. Paul.

Dated: July 1992,

PETER C. ERICKSON
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record which may adopt, reject, or modify the findings of fact, conclusions, and recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded each party adversely affected by this Report to file exceptions and present argument to the Commissioner of Health. Parties should contact Marlene E. Marschall, Commissioner of Health, 717 Delaware Street Southeast, Minneapolis, Minnesota 55440, to ascertain the procedure for filing exceptions or presenting argument.

MEMORANDUM

In 1986, the City of West St. Paul (hereinafter "the City") applied for an ambulance license with the Minnesota Department of Health. The City proposed to operate a basic life support (BLS) ambulance service within the city limits or primary service area (PSA). In the City's application, the service was proposed to be supplemental to the service provided by the existing BLS provider, Divine Redeemer Hospital. The City estimated that it would make less than 50 ambulance runs per year, out of an estimated 850 runs per year which are needed within the West St. Paul city limits. Department Memorandum, Appendix A, at A-11. In its application, the City stated how ambulance service would be provided if a license was granted as follows:

> It is important to understand that we are not seeking this license to be utilized by us as a primary provider service but rather to be available objectively as a supplemental service in extreme situations or infrequently as special or unique situations occur and similar to other currently licensed metropolitan services . . . which have been or are being maintained and used only as a supplement and back-up vehicle within their communities even though these communities are all being served on a primary basis by other licensed providers and services.

Department Memorandum, Appendix A, at A-21 (emphasis in original).

I/ An ambulance "run," as used in this context, is an emergency response where the responder transports the injured person to hospital facilities. This does not include responses which provide emergency care but do not

transport the injured person.

Divine Redeemer Hospital supported the City's application in a letter submitted by the Hospital's Administrator which stated:

> I would like to voice my support for your application for a Basic Life Support ambulance license. Your application, as stated, will provide increased service for the residents of West St. Paul in those situations which occasionally arise.

Department Memorandum, Appendix A, at A-51.

The Department's staff prepared a report to the Commissioner of Health regarding the City's application. The report stated, in part:

> C. Duplication of Existing Services
>
> The applicant states that the proposed BLS service is not a duplication nor intended to replace the existing provider of ALS services within the City of West St. Paul. The purpose of seeking licensure to provide BLS service is to supplement the services of the primary service provider, Divine Redeemer Hospital, and its backup services. At times that primary provider is unavoidably delayed in making a timely response to the scene of an emergency, the backup is not able to respond in a timely manner, or the medical emergency exceeds the capacity of the existing primary service area system.
>
> Therefore, since the city's rescue unit is at the emergency scene within the city's boundaries, its proposal to act as a supplemental BLS service in extreme situations, or infrequently as special or unique situations occur, or in the contingency of future changes in the EMS delivery system would enhance services to the residents of West St. Paul . . . .

Department Memorandum, Appendix B, at B-7.

The Commissioner of Health issued a determination adopting the staff report on September 16, 1986. A BLS license was issued on September 22, 1986. The primary service area for the license is the area within the city limits of West St. Paul. The license document certifies that the City is licensed to provide basic life support transportation within its primary service area. No limitations are expressed in the license itself to indicate that the City must defer or act as a "supplemental service" to any other ambulance service within the City's primary service area.

On September 22, 1986, the City began operating a BLS ambulance service pursuant to its licensed authority. In 1986, the City responded to 727 emergency calls but transported no injured persons. City's Answers to Request for Admissions, at paragraph 18. No injured persons were transported in 1988 and one

person was transported in 1990. Id. at VT 19-20. Between 1986 and 1991, the
City transported less than 50 persons, while responding to 6,419 emergency calls. Id. at paragraph 21.

In early 1991, responding to potential state funding cuts, the City explored the possibility of transporting injured persons to increase revenues. Craig Deposition, at 4-5. Part of that consideration included a meeting in February, 1991, between the City Manager of West St. Paul and two Department staff members; Wayne Arrowood, Assistant Chief of Regulation, and Diane Kline-Konecny, Licensing Coordinator of the Emergency Medical Service Section. The primary purpose of the meeting was to discuss the possibility that the City could upgrade its ambulance service from BLS to ALS (Advanced Life Support). Craig Deposition, at 6-7. The City Manager summarized part of the discussion that occurred as follows:

> And Mr. Arrowood also stated that we had an unrestricted license and that we could carry rcally any number of basic life support passengers or patients without any further Health Department action.
>
> It wasn't a suprise to me that we had a basic life support license so we didn't go over it in any great detail., It was -- I think it was taken for granted by all of us in the room.
>
> I recall it [the option of carrying more passengers under the City's existing license] as being one of the alternatives suggested by the Health Department staff.
>
> I don't recall spending a lot of time on that [the BLS option] That was just one of the things that was brought out and it wasn't one that suprised me or anything that I hadn't heard of before.
>
> I knew we had an unrestricted BLS license.

Craig Deposition, at 7-9.

The total amount of time spent discussing the possiblity of the City carrying "any number of basic life support passengers" was estimated at "[a] few minutes." Craig Deposition, at 8.

Both Department staff members recall the February meeting. Kline Deposition, at 5-8; Arrowood Deposition, at 10-11. Neither staff member recalls any meaningful discussion of the City's BLS ambulance service or any increase in the number of passengers to be carried by that service Kline Deposition, at 7-8; Arrowood Deposition, at 12-14. The City Manager does not recall that any aspect of the 1986 license application process was brought up in the February meeting. Craig Deposition, at 17.

Divine Redeemer objected to a proposal by the City to increase the number of ambulance runs by letter dated July 30, 1991. In response to that letter, the City Manager telephoned Mr. Arrowood. The City Manager described the contact as follows:

> When we received this letter dateu July the 30th, we became concerned that there was some effort underway to damage our license or to otherwise apply political pressure. So I telephoned Mr. Arrowood on the 31st and I asked of him, again reiterating whether there was any difficulty with our license or whether we had any problems carrying basic life support passengers under our existing license, and he stated that it was an unrestricted license. I think the phrase he used was scheduled, didn't have any schedules on it, and that we could proceed.'
>
> I don't recall any discussion about 1986 at that time.

Craig Deposition, at 24.

Since August 1, 1991, the City has made all BLS runs inside its primary service area where it has been the first to arrive, without waiting for any other ambulance service. City's Answers to Request for Admissions, at 22. The Department has refused to renew the City's BLS ambulance license due to this increase in ambulance runs by the City, resulting in this contested case.

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp,, 378 N.W.2d 63, 66 (Minn.App. 1985). Summary disposition is the administrative equivalent to summary judgment and the same standards apply. Minn. Rule 1400.5500(K). In a motion for summary disposition, the initial burden is on the moving party to show facts that establish a prima facie case and assert that no material issues of fact remain for hearing. Theile v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). Once the moving party has established a prima facie case, the burden shifts to the non-moving party. Minnesota Mutual Fire and Casualty Company v. Retrum, 456 N.W.2d 719, 723 (Minn.App. 1990).

2/ Schedules are restrictions on services to specified periods of time or to a specified group of people, or restricts the type of services it provides to a specified medical category. Minn. Rule 4690.0100, subp. 30. Schedules appear on the face of the license document. Arrowood Deposition, at 16.

To successfully resist a motion for summary disposition, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986). General averments are not enough to meet the non-moving party's burden under Minn.R.Civ.P. 56.05. id.; Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn.App. 1988). However, the evidence introduced to defeat a summary judgment motion need not be admissible trial evidence. Carlisle, 437 N.W.2d at 715 'citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)).

In this instance, the basic facts are undisputed. The City acknowledges that BLS ambulance service was provided from 1986 through 1991. The supplemental nature of this service from 1986 to July 31, 1991 is not at issue. The City admits that, after August 1, 1991, it transported persons if it was the first ambulance service on the scene and this practice dramatically increased the number of ambulance runs performed by the City. The Department acknowledges that the City holds a BLS license and no restrictions appear on that license. The essential dispute is whether limitations exist on the allowable service pursuant to the license.

Under Minn. Stat. 144.803, the Commissioner of Health is authorized to take adverse action, including nonrenewal, against the license of an ambulance service upon finding that "the licensee has violated sections 144.801 to 144.808 or has ceased to provide the service for which it is licensed." The City argues that it has not violated any statutory provision and it is providing the service for which it was licensed. Thus, the City maintains, there is no basis upon which the Commissioner can deny renewal of its BLS ambulance service license.

The Department maintains that "on August 1, 1991, [the City] ceased to provide the service for which it was licensed" which constitutes grounds for nonrenewal of the City's license under Minn. Stat. 144.803. Department Memorandum, at 8. The Department contends that the license granted to the City contains implied limitations created by the City's affirmative representations made in the application process. Department Memorandum, at 16-17. Those representations (as reflected in the Department staff report adopted by the Commissioner) were that the City's BLS ambulance service would limit itself to "supplemental service, extended only in extreme situations, or infrequently as special or unique situations occur, or in the contingency of future changes in the EMS delivery system There is no dispute that those representations were made in the application and the licensure process.

The City maintains that the license it received does not contain any limitations and none can be implied through the licensing process. In the alternative, the City argues that changes have occured in the emergency medical services (EMS) delivery system within the West St. Paul city limits (PSA) which warrant the increased number of BLS ambulance runs presently being made under the existing license.

To obtain a BLS ambulance license, an applicant must demonstrate that the proposed service is needed. Minn. Stat. 144.802, subd. 3(g). The factors to be considered in that showing include "the deleterious effects on the

public health from duplication, if any, of ambulance services that would result from granting the license." Minn. Stat. 144.802, subd. 3(g)(3).

That factor was expressly considered in the licensing process herein which occurred in 1986 and was met only through the repeated assurances by the City that they would transport only "in extreme situations or infrequently as special or unique situations occur" Department Memorandum, Appendix A, at A-21 (City Application).

A duplication of service is established where "all demand is being met by the current licensees." Hiawatha Aviation v. Minnesota Department of Health, 375 N.W.2d 496, 503 (Minn.App. 1985)(emphasis in original); aff'd 389 N.W.2d 507 (Minn. 1986). With the paucity of ambulance runs by the City from 1986 to July 31, 1991, it is clear that the demand for a primary provider of BLS service was being met by Divine Redeemer Hospital's service. During that period, the City was providing the service which it originally represented as needed and which justified the grant of a BLS license; that is, a supplemental service to be available in unusual circumstances.

When the City increased the level of its ambulance runs, the Department urged the City initially to return to its former service rate and now has proposed to not renew the City's ambulance license. Objections to an increased level of service were raised by Divine Redeemer Hospital in June, 1991, when the City was publicly discussing the possibility of increasing the number of its ambulance runs. Craig Deposition, at 15. In 1986, Divine Redeemer had supported the City's application for a BLS ambulance license to "provide increased service for the residents of West St. Paul in those situations whih occasionally arise" because it obviously did not consider the City a direct Competitor within its primary service area.

The issue herein is whether there is an unwritten but inherent limit tion on the City's ambulance license with respect to its relationship to the other provider in the service area (Divine Redeemer). Inherent limitations in ambulance licenses were recognized in Twin Ports Convalescent, Inc. v, Minnesota State Board of Health, 257 N.W.2d 343 (Minn. 1977). The limitation found in Twin Ports Convalescent was regarding the geographic area to which a licensee could provide service. The licensee in Twin Ports Convalescent was granted a license for the Minneapolis/St. Paul metropolitan area and opened a "branch office" in Duluth. While the license, on its face, purported to grant statewide authority and no statutory prohibition existed against this practice, the Minnesota Supreme Court found that the license contained an inherent limitation in the area proposed to be served. Twin Ports

Convalescent, 257 N.W.2d at 348. On that basis, the licensee was required to go through the public hearing process and demonstrate that new ambulance services in Duluth met the "public convenience and necessity" standard in the licensing statute. Id.

In this instance, during the licensure process, the City repeatedly stated that it would be providing service which would only supplement the existing ambulance service. Since July 31, 1991, the City has supplanted the existing service. Since the fundamental grant of authority was based upon the City's assertion that it would supplement the existing service and that assertion is no longer operative, the Judge finds that, as a matter of law, the City has ceased to provide the service for which it is licensed.

The City also maintains that the expansion of service is warranted under its original application because the license was sought in the event of "future changes in the EMS delivery system." The changes identified by the City are the change in ownership of Divine Redeemer Hospital, the arrival of City emergency vehicles before any other amublances, the increase in demand for ambulance service, and the reduction in state funding to local governments. The City has not introduced any evidence to indicate that the circumstances in 1991 differ from 1986 regarding ambulance availability or response times. The City responders usually arrive before Divine Redeemer ambulances, and did so in the years prior to 1991. Craig Deposition, at 34. Indeed, discussion of concerns on all issues except state funding cuts took place with Divine Redeemer Hospital in 1986. Craig Deposition, at 22. Management of Divine Redeemer Hospital was acquired by HealthEast in 1987. Craig Deposition, at 13. Evidence of the funding cuts is in the record, but that is not a change in the "EMS delivery system." While reductions in funding may affect how the City maintains its emergency services, that does not in itself entitle the City to unilaterally restructure its ambulance service within the primary service area of another licensee.

Two conversations were held between the City and Department staff on the subject of increasing the number of ambulance runs. Recollections of those conversations by the participants have been reproduced above. The City asserts it relied upon Department staff's assurances that it could increase the number of runs under its existing license. Based on those assurances, the City argues that the doctine of estoppel applies to prevent the Department from taking adverse action against the City's license.

Estoppel applies where a party shows that there were " representations or inducements, upon which [the party] reasonably relied, and that [the party] will be harmed if the claim of estoppel is not allowed. DHS v. Muriel Humphrey Residences, 436 N.W.2d 110, 117 (Minn.App. 1989), review denied, April 26, 1989, (quoting Brown v. Minnesota Department of Public Welfare, 368 N.W.2d 906, 910 (Minn. 1985)). In addition, wrongful conduct on the part of a government representative must be shown to estop a government agency. in the Matter of Westling Manufacturing, Inc., 442 N.W.2d 328, 333 (Minn.App. 1989),

review denied, August 25, 1989.

3/ In an affidavit, filed on June 8, 1992, the City's Attorney states that "[t]he City now has information, and verily believes, that because of financial difficulties Divine Redeemer Memorial Hospital was unable to continue both its hospital and ambulance business in 1991." No information or documentation are contained in the affidavit to support this allegation. The affidavit does not contain anything more than general averments. This is insufficient to meet the non-moving party's burden to produce material facts which are genuinely at issue. See Carlisle, 437 N.W.2d at 715. Since it is now mid-1992, the inability of any provider to continue ambulance service in 1991 should be readily apparent.

The "wrongful conduct" alleged in this case is either the Department's failure to issue an explicitly limited license in 1986, or the Department staff's failure to identify any inherent limitations in the license before the City began its expanded service. Failing to put a limitation on the face of a license does raise the possiblity of confusion where third parties are involved. However, no third parties were misled by this oversight. The City acknowledged that its role was supplementary for nearly five years by deferring to the primary service provider, Divine Redeemer Hospital. The City has not alleged it was unaware of the statements it made in its initial application and upon which the license was granted. The Judge does not conclude that the Department's failure to identify limitations on the face of the license itself is wrongful conduct which will support an estoppel.

The issue of wrongful conduct is closer with regard to the City's communications with Department staff. Licensees do rely upon the statements of agency personnel and are entitled to do so. Muriel Humphrey Residences, 436 N.W.2d at 118-119. However, for an agency error to rise to the level of wrongful conduct, the agency must be apprised of all the relevant facts. Muriel Humphrey Residences, 436 N.W.2d at 115. In this case, the City was aware that a change in its ambulance run rate would affect Divine Redeemer Hospital. Craig Deposition, at 14-17. Divine Redeemer Hospital advised the City by letter on July 30, 1991, that any change in its ambulance run rate would be inconsistent with the City's license. Department Memorandum, Appendix D, at D-3. In response to Divine Redeemer Hospital's objection, the City again contacted Department staff. Despite the explicit claim by the Hospital that the City's 1986 representations limited its license to provide ambulance service, the City did not raise this issue in its July 31, 1991 communication with Department staff.

The City argues that the representations made by Mr, Arrowood that its license was unrestricted are adequate to meet the standard required to estop the Department. However, neither conversation addressed the real issue, that is, whether the City's representations in 1986 limited the City's authority to expand its ambulance service. The Department did suggest that the City carry more passengers in response to the City's inquiry about additional funding sources. Craig Deposition, at 5 and 8. The City has not alleged, and no evidence has been offered to suggest that the Department staff's representations and suggestions were made with knowledge of the City's assertions in 1986 which were the basis for granting the license.

4/ The City objected to Appendix D, since it consists of the Affidavit of Milton Hertel and a letter sent from Mr. Hertel to the City. This evidence is objected to because Mr. Hertel was not disclosed on the list of Department witnesses and therefore not deposed. The Judge is not aware of any case law or administrative rule which limits parties on summary judgment motions to the submission of affidavits only from persons disclosed on witness lists.

The failure of the City to discuss the 1986 application "limitations" with the Department does affect whether the City's reliance upon the representations made by Mr. Arrowood was reasonable. See Muriel Homphrey Residences, 436 N.W.2d at 119. A party cannot rely in good faith on a representation by a governmental agency that an activity is permissable when the party has actual or constructive notice that its action is not allowed. Dege v. City of Maplewood, 416 N.W.2d 854, 856-7 (Minn.App. 1987). In this case, the City had notice that the expansion of its ambulance service might not be proper, not only because of the representations it made in 1986, but also because Divine Redeemer Hospital expressly questioned the propriety of increasing the number of ambulance runs. Despite that notice, the City never asked the Department for an opinion on whether the 1986 representations limited its license.5 Consequently, the City did not rely in good faith on the Department's representations.

Even if the City were to demonstrate that its reliance upon the Department's representations was reasonable, the harm suffered by the City must outweigh any damage to the public interest protected by the right asserted to establish an estoppel. Westling, 442 N.W.2d at 333 (citing Brown, 368 N.W.2d at 910). The City has completed its budgeting process for 1992 and will suffer hardship if its projected revenues from ambulance runs is not received. Craig Deposition, at 28-31, However, a pre-existing service which properly would have been receiving that same money is exposed to potential harm if the City is allowed to proceed. See Twin Ports Convalescent, 257 N.W.2d at 346. Furthermore, the City has been allowed to continue it; increased number of ambulance runs while this matter is pending. The City, now aware of the possiblity it may not be allowed to garner revenue from those runs, is able to budget for that contingency and mitigate any potential harm in future years.

The public interest to be protected in this instance is the continued operation of EMS service at its pre-existing level and enforcement of the statutory scheme of demonstrating need before establishing new ambulance service in an area. Where a substantial duplication of service exists, deleterious competition is likely to arise. In that event, neither tie City nor Divine Redeemer Hospital is likely to be able to continue operating an efficient ambulance service. This is precisely the reason that ambulance license service applicants are required to demonstrate that there is no substantial duplication of services before a license is granted. See Twin Ports Convalestent, 257 N.W.2d at 348.

5/ The good faith of the City in its dealings with Department staff must also be viewed in light of the history of the City's application for BLS licensure. Mr. Craig, the City Manager, was the individual who compiled and submitted the City's application in 1986. Mr. Craig was aware that the City had not exercised the authority conferred by an unrestricted BLS license since it had been first granted in 1986. Prior to both meetings with Department staff, Mr. Craig was aware of Divine Redeemer Hospital's objection to the City's plan to expand its authority. Mr. Craig did not inquire of Department

staff either at the February meeting or in the July telephone conversation whether representations he made in 1986 still acted to prevent the City from exercising the full authority available to a BLS ambulance licensee.

Where a licensee assumes authority, silence by the responsible government entity can create an estoppel. In the Matter of the Petition of Halberg Construction & Supply, Inc., 385 N.W.2d 381, 384 (Minn.App. 1986), rev. denied, June 19, 1986. In Halberg, a trucking company believed it had obtained a license with statewide authority in 1971, and acted upon that belief over a twelve year period. Throughout that period the company had frequent contact with the Minnesota Transportation Regulation Board (MTRB) which did not object to the company's statewide operations until 1984. The original license issued in that case was limited to only seven counties in northeastern Minnesota. The MTRB subsequently denied an application by Halberg to "clarify" the license by granting statewide authority. In response to the company's claim of estoppel, the Court of Appeals stated:

> While we recognize the public has an interest in a well-regulated shipping industry, we do not believe that interest is frustrated by our application of estoppel in this case. This matter is not similar to a new carrier seeking a permit or an existing carrier expanding into new markets. [citation omitted] Here other carriers, customers, and the public are already accustomed to relator's operations.

Id. at 384,

However, in this case, when the Department became aware that the 1986 licensure was based on a limited service (very shortly after the City had expanded its service), the Department urged the City to return to its supplemental role authorized in 1986. The harm to be weighed in determining appropriateness of estoppel in this case is not limiting the City's existing business, but preventing "expansion into new markets." The service to which the public and competitors had become accustomed was as a supplement to Divine Redeemer Hospital's ambulance service. The Department should be entitled to rely upon authoritative statements of applicants that they will adhere to certain conduct upon being granted a license. This protects the regulatory system without requiring the specificity found in other types of transporation regulation. Since the balance of private harm to public interest favors protection of the public interest in this case, estoppel is not appropriate.

The Department has shown that a BLS ambulance license was granted in 1986 based on represention which inherently limit the scope of activities which are authorized under that license. The undisputed facts show that the City has exceeded the scope of its license by offering an unrestricted primary BLS ambulance service within the city limits. By exceeding the scope of its license, the City has violated Minn. Stat. 144.803 by no longer offering the service for which it is licensed. The City's allegations that the EMS system has changed to warrant an increased number of ambulance runs have not beer supported by facts in the record. Equitable estoppel does not apply to the Department's actions because the Department's conduct was not wrongful, representations made by Department staff were not reasonably relied upon by the City, and the balance of interests favors the public interest protected by

the Department's action in this case. The Department is entitled to summary judgment in its favor.

P.C.E.